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Supreme Court, U.S.
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In The

Supreme Court of the United States

DAWN LUDWIG,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals, District III

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Wisconsin's homicide by intoxicated use of a motor vehicle statute violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution by improperly shifting the burden of proof concerning the issue of causation to the Accused.

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TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 2

Statement of the Case 8

Reasons for Granting the Writ 11

I. The Sixth and Fourteenth Amendments to the United States Constitution require the prosecution prove each fact required to prove the crime charged, specifically causation, by proof beyond a reasonable doubt 11

II. The State of Wisconsin's homicide by intoxicated use of a motor vehicle statute violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution by improperly shifting the burden of proof concerning the issue of causation to the Accused 17

A. Sec. 940.09(1)(a), Wis. Stat., Violates Due Process because by not requiring a causal connection between the intoxicated condition of the operator and the death of another person, it creates a mandatory presumption of causation 17

TABLE OF CONTENTS – Continued

Page

B. This Court must resolve the inconsistent approaches to causation 22

Conclusion..... 43

APPENDIX

Court of Appeals Decision .....App. 1

Circuit Court Decision.....App. 12

Denial of Petition for Review .....App. 28

TABLE OF AUTHORITIES

Page

CASES

Abney v. State, 766 N.E.2d 1175 (2002) 36

Allen v. State, 2002 WY 48, 43 P.3d 551 (2002) 43

Bell v. State, 2007 OK CR 43 (2007) 41

Blondes v. Hayes, 29 Md. App. 663, 350 A.2d 163 (1976) 37

Boyd v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990) 23

Caibaiosai v. Barrington, 643 F. Supp. 1007 (W.D. Wis. 1986) 8

Coates v. Maryland, 90 Md. App. 105, 600 A.2d 856 (1992) 37

Commonwealth v. Dyer, 934 N.E.2d 293, 77 Mass. App. Ct. 850 (2010) 38

Commonwealth v. Thur, 906 A.2d 552, 2006 PA Super 208 (2006) 30

David v. State, 261 Ga. App. 468, 583 S.E.2d 135 (2003) 25

Demmond v. State, 333 N.E.2d 922 (1975) 18

Dominic v. State, 461 P.2d 970 (1969) 18

Ex Parte Edwards, 816 So.2d 98 (2001) 34

Ex Parte Ervin, 991 S.W.2d 804 (1999) 32

Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965 (1985) ..... *passim*

Frazier v. People, 90 P.3d 807 (2004) 25

TABLE OF AUTHORITIES – Continued

Page

Hart v. State, 75 Wis.2d 371, 249 N.W.2d 810 (1977) 21

Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730 (1977) 12, 18, 22

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) ..... *passim*

Jeffries v. State, No. A-8167 (2007) 24

Johnson v. State, 326 N.E.2d 637 (1975) 18

Louisiana v. Jones, 298 So.2d 774 (1974) 19

Magaw v. State, 537 So.2d 564 (1989) 25

Micinski v. State, 487 N.E.2d 150 (1986) 36

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975) ..... *passim*

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319 (1977) 12, 13, 18

Payne v. Commonwealth, No. 081258 (2009) 33

People v. Hester, 131 Ill. 2d 91 (1989) 36

People v. Lardie, 452 Mich. 231, 551 N.W.2d 656 (1996) 27

People v. Mulcahy, 218 Ill. 332, 149 N.E. 266 (1925) 12

People v. Pomykala, 203 Ill. 2d 198, 784 N.E.2d 784 (2003) 18

People v. Santos, No. 2798N/07 (2008) 40

TABLE OF AUTHORITIES – Continued

Page

People v. Schaefer, 703 N.W.2d 774, 473 Mich. 418 (2005) 27

People v. Weems, 54 Cal. App. 4th 854, 62 Cal. Rptr. 2d 903 (1997) 34, 35

Ricky A. McCoy v. Commissioner of Public Safety, No. SC 18545 (2011) 35

Robinson v. State, 98 Ark. App. 237, 254 S.W.3d 750 (2007) 34

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) ..... *passim*

Smith v. State, 981 So.2d 1025 (2008) 39

State v. Arrington, No. 2 CA-CR 2008-0030 (2008) 24

State v. Archer, 619 So.2d 1071 (1993) 37

State v. Bailey, 184 N.C. App. 746, 646 S.E.2d 837 (2007) 29

State v. Benoit, 650 A.2d 1230 (1994) 31

State v. Bentley, 92 Wis.2d 860, 286 N.W.2d 153 (1979) 6

State v. Brouillette, 265 Neb. 214, 655 N.W.2d 876 (2003) 27

State v. Buchanan, No. 4-103/03-0395 (2004) 26

State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985) ..... *passim*

State v. Cid, No. A08-2266 (2010) 39

State v. Condon, 497 N.W.2d 272 (1993) 27

TABLE OF AUTHORITIES – Continued

Page

State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992) 41

State v. Davis, 680 S.E.2d 239 (2009) 29

State v. Dohlman, No. 94/05-0581 (2006) 26

State v. Downey, 145 N.M. 232, 195 P.3d 1244 (2008) 28

State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (1996) 41

State v. English, 140 P.3d 454, 333 Mont. 23, 2006 MT 177 (2006) 40

State v. Fonte, 281 Wis.2d 654, 698 N.W.2d 594 (2005) 7

State v. Gardner, 292 Wis.2d 682, 715 N.W.2d 720 (2006) 22, 23

State v. Gibson, No. A03-1713 (2004) 39

State v. Grampus, 288 S.C. 395, 343 S.E.2d 26 (1986) 41

State v. Green, 220 W. Va. 300, 647 S.E.2d 736 (2007) 42

State v. Hardman, 196 Or. App. 522, 102 P.3d 722 (2004) 30

State v. Hatfield, 2007 –Ohio– 7130 (Ohio App. Dist. 11 12/28/2007) 30

State v. Heft, 178 Wis.2d 823, 505 N.W.2d 437 (1993) 21

State v. Hubbard, 751 So.2d 552 (1999) 25

TABLE OF AUTHORITIES – Continued

Page

State v. Kalathakis, 563 So.2d 228 (1990) 37

State v. Kristy, 11 Conn. App. 473, 528 A.2d 390 (1987) 35

State v. Lamont, 2001 S.D. 92, 631 N.W.2d 603 (2001) 42

State v. Lawson, 128 W. Va. 136, 36 S.E.2d 26 (1945) 43

State v. Lechner, 217 Wis.2d 392, 576 N.W.2d 912 (1998) 7

State v. Lohmeier, 196 Wis.2d 432, 538 N.W.2d 821 (1995) 7

State v. Lohmeier, 205 Wis.2d 183, 556 N.W.2d 90 (1996) 7, 22

State v. Martin, 2007 Vt. 96 (2007) 33

State v. Mayl, 106 Ohio St.3d 207, 833 N.E.2d 1216 (2005) 29, 30

State v. McKenna, 11 Conn. App. 122, 525 A.2d 1374 (1987) 35

State v. Ortiz, 29 Conn. App. 825, 618 A.2d 547 (1993) 35

State v. Picotte, 261 Wis.2d 249, 661 N.W.2d 381 (2003) 7

State v. Rabe, 96 Wis.2d 48, 291 N.W.2d 809 (1980) 6

State v. Ritchie, 590 So.2d 1139 (1991) 37

TABLE OF AUTHORITIES – Continued

Page

State v. Roggenkamp, 153 Wash. 2d 614, 106 P.3d 196 (2005) 33

State v. Scott, No. M2006-02067-CCA-R3-CD (2008) 31

State v. Seeler, 316 S.W.3d 920 (2010) 39

State v. Shane Trahan, 637 So.2d 694 (1994) 36

State v. Snow, 464 A.2d 958 (1983) 37

State v. Sohn, 193 Wis.2d 346, 535 N.W.2d 1 (1995) 7

State v. Stanton, 176 N.J. 75, 820 A.2d 637 (2003) 28

State v. Steen, 2000 N.D. 152, 615 N.W.2d 555 (2000) 41

State v. Taylor, 463 So.2d 1274 (1985) 36

State v. Turk, 154 Wis.2d 294, 453 N.W.2d 163 (1990) 10

State v. Two Bulls, 1996 SD 53, 547 N.W.2d 764 (1996) 42

State v. Vollmer, 163 W. Va. 711, 259 S.E.2d 837 (1979) 43

State v. Whittaker, 973 A.2d 299 (Sup. Ct. 2009) 40

State v. Wong, 125 N.H. 610 (1984) 40

State v. Woodman, 12 Kan. App. 2d 110, 735 P.2d 1102 (1987) 26

State v. Yudichak, 151 Vt. 400, 561 A.2d 407 (1989) 33

TABLE OF AUTHORITIES – Continued

Page

Stephenson v. State, 648 N.E.2d 395 (1995) 36

Ulster County Court v. Allen, 442 U.S. 140 (1979) 23

Ward v. Commonwealth, No. 2007-CA-000753-MR (2008) 26

Wilson v. Commonwealth, 147 S.W.2d 62 (1941).....19

Wisconsin v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985) 10

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment XIV, Sec. I.....2, 11

STATUTES

28 U.S.C. § 1257(a) 1

17-A M.R.S.A. § 35(3) (1983) 37

17-A M.R.S.A. § 35(4) (1983) 37

Ala. Code § 32-5A-192 34

Ark. Code Ann. § 5-10-105(a)(1)(A).....34

Ariz. Stat. § 13-105(9)(d) 24

Ariz. Stat. § 13-1102(A) 24

Article 27 Maryland Code, Section 388A.....37

AS 11.41.110 24

Cal. Veh. Code § 23153(b).....34

Colo. Stat. § 18-3-106(1)(b)(I).....25

TABLE OF AUTHORITIES – Continued

Page

Conn. Stats. 53a-56b(a) 35

6 Del. Code Title 11, Section 630A 35

21 Del. Code § 4177 35

Fla. Stat. § 316.193(3) 25

G.L. 1956 § 31-27-2.2 31

G.L. c. 90, § 24G(a) 38

720 ILCS 5/9-3(b) 13, 36

Indiana Code Section 9-30-5-5 36

Iowa Code § 707.6A(1) 13, 26

KRS 501.020(3) 26

KRS 507.040(1) 26

K.S.A. 1986 Supp. 21-3405a 26

LSA-R.S. 14:32.1 36

MCL 257.625(4) 13, 27

Minn. Stat. 609.21 ..... 27, 38

Mississippi Code Annotated Section 63-11-30 (Supp. 2007) 39

Missouri Code Section 565.024 39

Montana Code Section 45-2-101(42) 40

Montana Code Section 45-5-104(1) 40

N.C. Gen. Stat. § 20-138.1 29

N.C. Gen. Stat. § 20-138.2 29

N.C. Gen. Stat. § 20-141.4(a1) 29

TABLE OF AUTHORITIES – Continued

Page

N.D.C.C. § 12.1-16-03 41
Neb. Rev. Stat. § 28-306 27
New York Penal Law § 120.03(1) 13, 40
New York Penal Law § 120.04(1) 13, 40
New York Penal Law § 125.13(1) 13, 40
New York Penal Law § 125.14(1) 13, 40
New York Penal Law § 125.14(5) 13, 40
N.J.S.A. 2C:11-5a 28
NMSA 1978, § 66-8-101(A) (1991) 28
NMSA 1978, § 66-8-101(C) 28
NMSA 1978, § 66-8-102 (1953) 28, 29
NMSA 1978, § 66-8-113 (1987) 28, 29
OCGA § 40-6-391 25
OCGA § 40-6-393(a) 25
Ohio Rev. Code 2903.06(A) 29
Ohio Rev. Code 4511.19 29
Ohio Rev. Code 4511.19(A)(1)(b) 30
ORS 163.118 30
21 O.S. 2001, § 711(1) 41
75 Pa. C.S.A. § 3735 30
75 Pa. C.S.A. § 3802 30
RCW 46.61.520 34
RCW 46.61.522 34

TABLE OF AUTHORITIES – Continued

Page

RSA 630:3 40

S.C. Code Ann. § 56-5-2945 (Supp. 1994) 41

T.C.A. § 39-13-213(a)(2) 31

T.C.A. § 55-10-401(a)(1) 32

T.C.A. § 55-10-408 31

Texas Penal Code § 49.08 32

Va. Code § 18.2-36.1 33

Va. Code § 18.2-266 33

23 V.S.A. § 1091(C) 33

23 V.S.A. § 1201(a)(2) 32

23 V.S.A. § 1210(e) 32

W. Va. Code, 17C-5-1 42

Wis. Stat. § 346.63 ..... 17, 19

Wis. Stat. § 940.09 ..... *passim*

Wyo. Stat. Ann. § 6-1-104(a)(iii) 43

Wyo. Stat. Ann. § 6-2-106(b) 43

Wyo. Stat. Ann. § 10-6-103 43

Wyo. Stat. Ann. § 31-5-233 43

Wyo. Stat. Ann. § 41-13-206 43

OPINIONS BELOW

Dawn Ludwig, Petitioner, hereby petitions the United States Supreme Court to review the decision of the Court of Appeals, District III, in *State v. Ludwig*, 2009AP1724CR, filed on August 31, 2010. Cert. denied. The opinion of the Wisconsin Court of Appeals, District III, is reproduced at App. 1. The opinion of the Wisconsin Circuit Court, Branch V, is reproduced at App. 12. The Denial of Review by the Supreme Court of Wisconsin is reproduced at App. 28.

STATEMENT OF JURISDICTION

On August 31, 2010, the Wisconsin Court of Appeals, District III issued its opinion affirming the dismissal of the Petitioner's direct appeal, and affirmed the conviction and sentence of the Brown County Circuit Court. On January 11, 2011, the Supreme Court of Wisconsin denied the Petitioner's timely filed Petition for Review. Petitioner, Dawn Ludwig, timely filed the instant Petition for *Certiorari* on or before April 11, 2011. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, Sec. I.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State of wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wis. Stat., Sec. 940.09.

940.09 Homicide by intoxicated use of vehicle or firearm.

(1) Any person who does any of the following may be penalized as provided in sub. (1c):

(a) Causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.

(am) Causes the death of another by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

(b) Causes the death of another by the operation or handling of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01(46m).

(bm) Causes the death of another by the operation of a commercial motor vehicle while the person has an alcohol concentration of 0.04 or more but less than 0.08.

(c) Causes the death of an unborn child by the operation or handling of a vehicle while under the influence of an intoxicant.

(cm) Causes the death of an unborn child by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

(d) Causes the death of an unborn child by the operation or handling of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01(46m).

(e) Causes the death of an unborn child by the operation of a commercial motor vehicle while the person has an alcohol concentration of 0.04 or more but less than 0.08.

(1c)(a) Except as provided in par. (b), a person who violates sub. (1) is guilty of a Class D felony.

(b) A person who violates sub. (1) is guilty of a Class C felony if the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2).

(1d) A person who violates sub. (1) is subject to the requirements and procedures for installation of an ignition interlock device under s. 343.301.

(1g) Any person who does any of the following is guilty of a Class D felony:

(a) Causes the death of another by the operation or handling of a firearm or airgun while under the influence of an intoxicant.

(am) Causes the death of another by the operation or handling of a firearm or airgun while the person has a detectable amount of a restricted controlled substance in his or her blood.

(b) Causes the death of another by the operation or handling of a firearm or airgun while the person has an alcohol concentration of 0.08 or more.

(c) Causes the death of an unborn child by the operation or handling of a firearm or airgun while under the influence of an intoxicant.

(cm) Causes the death of an unborn child by the operation or handling of a firearm or airgun while the person has a detectable amount of a restricted controlled substance in his or her blood.

(d) Causes the death of an unborn child by the operation or handling of a firearm or airgun while the person has an alcohol concentration of 0.08 or more.

(1m)(a) A person may be charged with and a prosecutor may proceed upon an information based upon a violation of any combination of sub. (1)(a), (am), or (b); any combination of sub. (1)(a), (am), or (bm); any combination of sub. (1)(c), (cm), or (d); any combination of sub. (1)(c), (cm), or (e); any combination of sub.

(1g)(a), (am), or (b) or; any combination of sub. (1g)(c), (cm), or (d) for acts arising out of the same incident or occurrence.

(b) If a person is charged in an information with any of the combinations of crimes referred to in par. (a), the crimes shall be joined under s. 971.12. If the person is found guilty of more than one of the crimes so charged for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under s. 23.33(13)(b) 2. and 3., under s. 30.80(6)(a) 2. and 3., under s. 343.307(1) or under s. 350.11(3)(a) 2. and 3. Subsection (1)(a), (am), (b), (bm), (c), (cm), (d), and (e) each require proof of a fact for conviction which the others do not require, and sub. (1g)(a), (am), (b), (c), (cm), and (d) each require proof of a fact for conviction which the others do not require.

(2)(a) In any action under this section, the petitioner has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant, did not have a detectable amount of a restricted controlled substance in his or her blood, or did not have an alcohol concentration described under sub. (1)(b), (bm), (d) or (e) or (1g)(b) or (d).

(b) In any action under sub. (1)(am) or (cm) or (1g)(am) or (cm) that is based on the petitioner

allegedly having a detectable amount of methamphetamine or gamma-hydroxybutyric acid or delta-9-tetrahydrocannabinol in his or her blood, the petitioner has a defense if he or she proves by a preponderance of the evidence that at the time of the incident or occurrence he or she had a valid prescription for methamphetamine or one of its metabolic precursors or gamma-hydroxybutyric acid or delta-9-tetrahydrocannabinol.

(3) An officer who makes an arrest for a violation of this section shall make a report as required under s. 23.33(4t), 30.686, 346.635 or 350.106.

History: 1977c. 173; 1981c. 20, 184, 314, 391; 1983a. 459; 1985a. 331; 1987a. 399; 1989a. 105, 275, 359; 1991a. 32, 277; 1993a. 317; 1995a. 425, 436; 1997a. 237, 295, 338; 1999a. 32, 109; 2001a. 16, 109; 2003a. 30, 97; 2009a. 100.

NOTE: For legislative intent see chapter 20, laws of 1981, section 2051(13).

Probable cause for arrest on a charge of homicide by intoxicated use of a motor vehicle justified taking a blood sample without a search warrant or arrest. *State v. Bentley*, 92 Wis.2d 860, 286 N.W.2d 153 (1979).

Each death caused by an intoxicated operator's negligence is chargeable as a separate offense. *State v. Rabe*, 96 Wis.2d 48, 291 N.W.2d 809 (1980).

Because driving while intoxicated is inherently dangerous, the state need not prove a causal connection

between the driver's intoxication and the victim's death. Sub. (2) does not violate the right against self-incrimination. *State v. Caibaiosai*, 122 Wis.2d 587, 363 N.W.2d 574 (1985). Affirmed. *State v. Fonte*, 281 Wis.2d 654, 698 N.W.2d 594 (2005).

The definition of vehicle in s. 939.22(44) applies to this section and includes a tractor.

State v. Sohn, 193 Wis.2d 346, 535 N.W.2d 1 (1995).

Sub. (2) does not violate the constitutional guarantee of equal protection. *State v. Lohmeier*, 196 Wis.2d 432, 538 N.W.2d 821 (1995).

The defense under sub. (2) does not require an intervening cause; a victim's conduct can be the basis of the defense. The s. 939.14 rule that contributory negligence is not a defense to a crime does not prevent considering the victim's negligence in relation to causation. *State v. Lohmeier*, 205 Wis.2d 183, 556 N.W.2d 90 (1996).

Second-degree reckless homicide is not a lesser included offense of homicide by intoxicated use of a motor vehicle. *State v. Lechner*, 217 Wis.2d 392, 576 N.W.2d 912 (1998).

The common law "year-and-a-day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is prospectively abrogated.

State v. Picotte, 261 Wis.2d 249, 661 N.W.2d 381 (2003).

This statute does not violate due process. *Caibaiosai v. Barrington*, 643 F. Supp. 1007 (W.D. Wis. 1986).

Homicide By Intoxicated Use Statute. Sines. Wis. Law. April, 1995.

STATEMENT OF THE CASE

On June 26, 2006, Ms. Ludwig, was involved in a motor vehicle accident wherein two people were killed. Eventually, Ms. Ludwig was charged with an eight count Third Amended Information. (R. 41). The Third Amended Information contained two counts of Homicide by Intoxicated Use of a Vehicle through the operation of a vehicle while under the influence of an intoxicant; two counts of Homicide by Intoxicated Use of a Vehicle through the operation of a motor vehicle with a blood alcohol concentration in excess of .08%; one count of Second Degree Reckless Endangerment; one count of Operating a Motor Vehicle While Intoxicated – 4 Offense; and one count of Operating a Motor Vehicle While Intoxicated – 4 Offense – based on the operation of a vehicle with a blood alcohol concentration in excess of .08. (R. 41). The record indicates that the motor vehicle operated by the Petitioner, Dawn Ludwig, which was in the northbound lane of Route 41 while traveling southbound, and was involved in a head on collision with a motor vehicle traveling northbound on Route 41. (R. 103, at 45-50). The record contains no explanations as to the reason or manner in which the vehicle operated by Ms. Ludwig

got into the northbound lane of Route 41. The record contains no additional evidence of erratic driving by Ms. Ludwig.

Ms. Ludwig was represented by private counsel throughout this case. During the course of these proceedings, Ms. Ludwig's attorneys obtained certain relevant discovery including Dawn Ludwig's medical records from Robert A. Gahl, M.D. indicating that since at least 1995, Ms. Ludwig has been suffering with a cranial polyneuropathy which most likely represents early multiple sclerosis and/or vestibulitis both of which result in vertigo and unsteadiness. (R. 74, Ex. "2" A-000060 Report of Dr. Douglas E. Rapisarde). One of the manifestations of Ms. Ludwig's medical condition was her veering to the left. (R. 74, Ex. "2" A-000060). At all times relevant hereto, the applicable Wisconsin law clearly provides that a person commits a Class D felony who:

> . . . causes the death of another, (2) by the operation of a vehicle, (3) while under the influence of an intoxicant. To wit: Any person who does any of the following may be penalized as provided in sub.(1c):(a) Causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant. (b) Causes the death of another by the operation or handling of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01(46m).

(940.09(1) Wis. Stat.) The applicable Wisconsin statutes further provide as follows:

> Whoever, recklessly causes the death of another human being is guilty of a Class D felony. Second degree reckless homicide is analogous to the prior offense of homicide by reckless conduct. The revised statute clearly requires proof of a subjective mental state, i.e., criminal recklessness.

See Wis. Stat. § 939.24 and the note thereto.

Section 940.09(2), provides an affirmative defense for homicide by intoxicated use of a vehicle. According to *Wisconsin v. Caibaiosai,* 122 Wis.2d 587, 596, 363 N.W.2d 574, 578 (1985), an affirmative defense exists when there is an intervening cause between the intoxicated operation of the vehicle and the death of an individual. An "intervening cause" has been defined as "a new and independent force which breaks the causal connection between the original act or omission and the injury, and itself becomes the direct and immediate cause of the injury." *State v. Turk,* 154 Wis.2d 294, 296, 453 N.W.2d 163, 164-65 (1990) (quoted source omitted).

Pursuant to the above statute and while entering her plea of guilty, Ms. Ludwig was advised that, under the law of Wisconsin, the prosecution was not required to prove causation of death.

REASONS FOR GRANTING THE WRIT

This Court should grant the instant Petition for *Certiorari* because there are a number of States which unconstitutionally create and shift the burden of proof for the essential element of causation in homicide by intoxicated operation of motor vehicles, when the driver of one of the vehicles in a fatal accident was intoxicated. Such a statutory presumption is out of step with established precedent set forth in the following line of cases: *Francis v. Franklin*, 471 U.S. at 307, 105 S.Ct. 1965 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). Additionally, there is a split in approaches taken by the various State legislatures concerning the presumption of causation in the above-referenced statutes. *See* survey of State laws contained in Argument, Sec. II, infra. As a result, there is inconsistency between the various States creating a constitutional issue that this Court should resolve.

I. THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE PROSECUTION PROVE EACH FACT REQUIRED TO PROVE THE CRIME CHARGED, SPECIFICALLY CAUSATION, BY PROOF BEYOND A REASONABLE DOUBT

The State of Wisconsin's homicide by intoxicated use of a motor vehicle statute violates the Due Process Clause to the Fourteenth Amendment to the

United States Constitution by improperly shifting the burden of proof concerning the issue of causation to the Accused. It is well-established that due process requires that the prosecution have the burden of proving each element required to establish the *prime facie* case to a crime charged. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). In this regard, this Court has consistently held that the element of causation is an essential element in the *prime facie* case of homicide. *Patterson v. New York*, 432 U.S. 197, 204, 97 S.Ct. 2319, 2324 (1977). In short a coincidence of time and place concerning a defendant's conduct and the outcome, without causation, is not sufficient to sustain a conviction. *See, e.g., People v. Mulcahy*, 218 Ill. 332, 149 N.E. 266 (1925). In fact, the Supreme Court has held that when causation of a particular result is an element of the offense charged, due process commands that the prosecution has the burden to prove causation and causation in fact beyond a reasonable doubt. *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730 (1977).

By removing causation as an element the prosecution must prove pursuant to its homicide by intoxicated use of a motor vehicle statute, and requiring a defendant to raise causation as an affirmative defense, the Wisconsin Legislature has improperly shifted the burden of proof for the element of causation. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975); *see also, Francis,* 471 U.S. at 307, 105 S.Ct. at

1965; *Sandstrom*, 442 U.S. at 510, 99 S.Ct. at 2450. Granting *certiorari* to the instant case is essential because in addition to Wisconsin, several other states have passed similar homicide statutes relating to the operation of a motor vehicle while under the influence which similarly eliminate causation as an element of the offense. *See, e.g.*, Wis. Stat. § 940.09 [Wisconsin]; MCL 257.625(4) [Michigan]; Iowa Code § 707.6A(1) [Iowa]; contra, New York Penal Law §§ 120.03(1), 120.04(1), 125.14(1),(5), 125.13(1) [New York]; 720 ILCS 5/9-3(b) [Illinois].

This Court should grant the instant Petition for *Certiorari* because the State of Wisconsin's homicide by intoxicated use of a motor vehicle statute is contrary to the well-established due process requirement that the prosecution has the burden of proving causation in a homicide case. As set forth above, this Court has long held that due process requires that the prosecution has the burden of proving each element required to establish the *prima facie* case of the crime charged. *Francis*, 471 U.S. at 307, 105 S.Ct. at 1965; *Sandstrom*, 442 U.S. at 510, 99 S.Ct. at 2450; *Winship*, 397 U.S. at 358, 90 S.Ct. 1068. This Court has further recognized that causation is an essential element in a *prima facie* case of homicide. *Patterson*, 432 U.S. at 204, 97 S.Ct. at 2324. Furthermore, this Court has held that the duty of the government to establish guilt beyond a reasonable doubt is recognized as "basic in our law and rightly one of the boasts of a free society." *Winship*, 397 U.S. at 362, 90 S.Ct. at 1071.

Initially, the *Winship* Court primarily addresses the issue of the constitutionally required burden of proof in criminal cases. Thereafter, this Court began to address the issue of whether statutory presumptions improperly shifted the burden of proof to the defendants in *Sandstrom*, 442 U.S. at 510, 99 S.Ct. at 2450. The *Sandstrom* court analyzed Montana's deliberate homicide statute which required the prosecution to prove the element of intent, but in which the prosecution received a jury instruction indicating that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513, 99 S.Ct. at 2453. In finding that the Montana statutory and jury instruction scheme violated due process, the *Sandstrom* court concluded that intent was one of the essential elements to a prima facie case for homicide, and by inferring a presumption of attempt the jury instruction at issue coupled with the Montana's sentencing scheme, improperly shifted the essential element of intent to the defendant. *Id.* at 525, 99 S.Ct. at 2459. Thereafter, the *Sandstrom* court held that the jury instruction improperly shifted the burden of proof as to intent to the defendant and violated due process. *Id.*

Similarly, in *Mullaney*, the Supreme Court considered a Maine homicide statute which required a defendant to establish by a preponderance of evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. *Mullaney*, 421 U.S. 684, 95 S.Ct. at 1881. Specifically, the jury instruction that accompanied the

statute at issue provided that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion with the sudden provocation. *Id.* at 687, 95 S.Ct. at 1883. In determining that the main statutory scheme violated due process because it improperly shifted the burden of proof as to the heat of passion element necessary for manslaughter, the *Mullaney* court cautioned that if the application of *Winship* regarding the burden of proof were limited to those facts that constitute a crime as defined by state law, states could undermine many of the interests that the *Winship* decision sought to protect without effecting any substantive change in its law merely by redefining the elements that constitute a *prima facie* case. *Id.* at 699, 95 S.Ct. at 1889.

Next, in *Francis*, this Court ruled that the statutory scheme for murder coupled with the jury instructions which indicated that "the acts of a person of sound mind and discretion are presumed to be a product of the person's will, but that presumption may be rebutted" and "a person of sound mind and discretion is presumed to intend the nature and probable consequences of his acts but that presumption might be rebutted" improperly shifted the element of intent to the defendant in a murder conviction. *Francis*, 471 U.S. at 307, 105 S.Ct. at 1965. At trial, the defendant's sole defense to the malice murder charge was a lack of requisite attempt

to kill. The analysis of whether a statute or instruction unconstitutionally shifts the burden of proof is straightforward because the threshold inquiry is determining the nature of the presumption that it describes. *Id.* at 315, 105 S.Ct. at 1971. The *Francis* court further noted that a court must determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference. *Id.* In this regard, a statute or an instruction creates a mandatory presumption if it instructs a jury that it must infer the presumed fact if the state proved certain predicate facts. *Id.* Conversely, the *Francis* court noted that a permissive inference suggests to the jury a possible conclusion to be drawn if the state proves predicate facts, but does not require the jury to draw that conclusion. *Id.* Mandatory presumptions are subject to the *Winship* and *Sandstrom* analyses and violate the due process clause because they shift the burden of persuasion of an element of the offense. *Id.*

II. THE STATE OF WISCONSIN'S HOMICIDE BY INTOXICATED USE OF A MOTOR VEHICLE STATUTE VIOLATES THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY IMPROPERLY SHIFTING THE BURDEN OF PROOF CONCERNING THE ISSUE OF CAUSATION TO THE ACCUSED

A. Sec. 940.09(1)(a), Wis. Stat., Violates Due Process because by not requiring a causal connection between the intoxicated condition of the operator and the death of another person, it creates a mandatory presumption of causation.

The crime of homicide by intoxicated operation of a motor vehicle is unconstitutional in that it does not require a causal connection between the intoxicated condition of the operator and the death of another person.

The Wisconsin Supreme Court has ruled that it is negligence per se to operate a motor vehicle while intoxicated. *State v. Caibaiosai,* 122 Wis.2d 587, 595, 363 N.W.2d 574, 578 (1985). The Wisconsin legislature has determined that combining the operation of a motor vehicle with being in an intoxicated state is conduct which is *malum prohibitum* and is pervasively antisocial. Since the conduct is considered inherently evil, it conceptually cannot be divided into portions which are bad and portions which are not bad. Wis. Stat. § 346.63. And because driving under the

influence of an intoxicant is *malum prohibitum* it is impossible to separate the intoxication from the driving or the driving from the intoxication. *State v. Caibaiosai*, 122 Wis.2d 587, 363 N.W.2d 574 (1985). As discussed herein, Section 940.09, Wis. Stat., does not include as an element of the crime a direct causal connection between the fact of defendant's intoxication, conceptualized as an isolated act, and the victim's death. The legislature has determined this activity so inherently dangerous that proof of it need not require causal connection between the defendant's intoxication and the death. *Caibaiosai,* 122 Wis.2d at 595, 363 N.W.2d at 578.

Wisconsin cannot be relieved of the constitutional restraint of requiring proof that the intoxicated person actually caused the accident which has been an essential element of the crime for a case for homicide since the common law.

The Petitioner's issue with the Wisconsin sentencing scheme in the instant case is that there is a mandatory presumption created between intoxication and causation of death. Here, it is well established that causation is an essential element of homicide. *See Patterson*, 432 U.S. at 197, 97 S.Ct. at 2319; *Kibbe*, 431 U.S. at 145, 97 S.Ct. at 1730; *see also People v. Pomykala*, 203 Ill. 2d 198, 784 N.E.2d 784 (2003); *Demmond v. State*, 333 N.E.2d 922 (1975) (indicating causation as an element of homicide); *Johnson v. State*, 326 N.E.2d 637 (1975) (indicating causation is an element of the offense of homicide); *Dominic v. State*, 461 P.2d 970 (1969) (reversing a

conviction for second degree manslaughter arising from a three automobile traffic accident for failure of the prosecution to link causation to intoxication beyond reasonable doubt); *Louisiana v. Jones*, 298 So.2d 774 (1974) (reversing conviction for negligent homicide because of lack of causation); *Wilson v. Commonwealth*, 147 S.W.2d 62 (1941) (generally holding causation as an element of mandatory manslaughter).

The above Wisconsin statutes violate due process because they have done away with the element of causation. Here, the Supreme Court of Wisconsin has ruled that it is negligence *per se* to operate a motor vehicle while intoxicated. *Caibaiosai*, 122 Wis.2d at 595, 363 N.W.2d at 578. Additionally, the Wisconsin legislature has determined that combining the operation of a motor vehicle with being in an intoxicated state is conduct which is *malum prohibitum* and is pervasively antisocial. Since the conduct is considered inherently evil, it conceptually cannot be divided into portions which are bad and portions which are not bad. Wis. Stat. § 346.63, entitled "Operating under the influence of intoxicants" is violated by a person who, one, operates a motor vehicle, and two, is at the time under the influence of an intoxicant. The commission of the offense does not require any erratic or negligent driving. Because driving under the influence of an intoxicant is *malum prohibitum* it is impossible to separate the intoxication from the driving or the driving from the intoxication. *Caibaiosai*, 122 Wis.2d at 587, 363 N.W.2d at 574, Wis. Stat. § 940.09,

does not include as an element of the crime a direct causal connection between the fact of defendant's intoxication, conceptualized as an isolated act, and the victim's death. The Wisconsin legislature has determined this activity so inherently dangerous that proof of it need not require causal connection between the defendant's intoxication and the death. *Caibaiosai*, 122 Wis.2d at 595, 363 N.W.2d at 578.

Like the jury instructions at issue in *Sandstrom, Francis*, and *Mullaney, supra*, Wisconsin's jury instructions add to the problem caused by the statutorily created mandatory presumption. In *Caibaiosai, supra*, the defendant's requested affirmative defense instruction under Wis. Stat. § 940.09(2), JI – Criminal, Part I, No. 1185 was denied. The court dispensed with the burden of proving a causal connection between the wrongful conduct (here, the intoxication or faulty operation of a vehicle while under the influence of an intoxicant) and the particular result of the wrongful conduct (here, death), under § 940.09 the state need prove only that the operation of the vehicle caused the death. However, the defendant had alleged that a passenger on the back of a motorcycle could easily affect the controllability of the vehicle and that road conditions could cause a motorcycle to leave the road and crash. Thus a jury would be instructed regarding causation as follows:

> "The third element of this offense requires that the relation of cause and effect exists between the death of [the victim] and the defendant's operation of a vehicle. Before such

> relation of cause and effect can be found to exist, it must appear that the defendant's operation of his vehicle was a substantial factor in producing the death. That is, the defendant's operation must have been a factor which had substantial effect in producing the death as a natural result.
>
> "It is not required that the death was caused by any drinking of alcohol or by any negligent or improper operation of the vehicle. What is required is that the injury was caused by the defendant's operation of the vehicle."

Wis. J.I. – Cr. No. 1885.

Caibaiosai held that Sec. 940.09(1)(a) provides that when a person operates a vehicle while intoxicated and a death results, the defendant is guilty of a felony, even if there is no causal connection between the intoxication and the death and even if the defendant's actual operation of the vehicle is in no way faulty. Thereby producing the absurd results foreshadowed in the dissent written by Justice Abramson in *Caibiosai*. *See*, *State v. Heft*, 178 Wis.2d 823, 505 N.W.2d 437 (1993) (defendant claimed she was denied her right to due process when the circuit court *refused* to require a witness, to invoke his fifth amendment privilege in the presence of the jury, though defendant claimed it was the witness who, by **rear-ending** her car, caused the accident). *See also*, *Hart v. State*, 75 Wis.2d 371, 249 N.W.2d 810 (1977) (negligence of the victim was undisputed, jury instruction denied);

State v. Gardner, 292 Wis.2d 682, 715 N.W.2d 720 (2006) (statute creating a defense to the crime, did not improperly transfer the burden of proof from the State to the defendant but rather, required him to prove that he could not be held legally responsible under the statute). And *see*, *State v. Lohmeier*, 205 Wis.2d 183, 556 N.W.2d 90 (1996) (jury instructed that "it is no defense to a prosecution for a crime that the victim may have been contributorily negligent.")

In light of the above, the Wisconsin sentencing scheme in the instant case is that a mandatory presumption is created between intoxication and causation of death contrary to *Winship, Sandstrom, Francis, Kibbe,* and *Mullaney*.

B. This Court must resolve the inconsistent approaches to causation.

The Wisconsin approach

Wisconsin's drunk driving statute violates due process because it improperly shifts the burden of proof regarding the element of causation to the defense and is inconsistent with many other States that have considered the issue. The constitutionality of Wisconsin's statute rests with the ability to redefine elements, presumptions and affirmative defenses.

The proper standard for Wisconsin courts to apply when a defendant contends that the interplay

of legally correct instructions impermissibly misled the jury is whether there is a reasonable likelihood that the jury applied the challenged instructions in a manner that violates the constitution. *See, Boyd v. California*, 494 U.S. 370, 378-81, 110 S.Ct. 1190 (1990).

In *State v. Gardner*, 292 Wis.2d 682, 715 N.W.2d 720 (2006), defendant's main contention was that the statutory scheme creates "rebuttable and irrebuttable presumptions of guilt," which violate his constitutional right to due process. *See Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979). The presumption can be permissive, which "allows – but does not require – the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one," *Id.* at 157, or it can be mandatory, requiring that the trier of fact "must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Id.*

A permissive presumption is constitutional as long as there is a rational connection between the basic fact and the elemental fact. *Id.* at 165. A mandatory presumption, however, whether conclusive or rebuttable, is not constitutional because it relieves the State of its burden to prove every element of an offense beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 521-24 (1979).

Wisconsin's drunk driving statute violates due process because it improperly shifts the burden of proof regarding the element of causation to the defense and is inconsistent with many other States that have considered the issue. The following is a compilation of states listed according to their burden of proof such as, per se statutes versus statutes which have a causation component.

"Per Se Statutes"

ALASKA

AS 11.41.110 (second-degree murder), or engaging in conduct that resulted in death under circumstances manifesting extreme indifference to the value of human life. *Jeffries v. State*, No. A-8167 (2007) (extreme indifference to human life requirement supported by defendant's past convictions, refusal to participate in court-ordered treatment for alcohol abuse, driving on a suspended or revoked license, and "extreme intoxication" on the night of the accident were sufficient to allow the murder charge to go to the jury, even if the defendant did not engage in "egregiously dangerous driving").

ARIZONA

Arizona does not require proof of negligence to convict. *See* Ariz. Stat. § 13-1102(A) (negligent homicide). *State v. Arrington*, No. 2 CA-CR 2008-0030 (2008) (criminal negligence supported by intoxication while driving. *See* Ariz. Stat. § 13-105(9)(d)).

COLORADO

Colo. Stat. § 18-3-106(1)(b)(I) ("DUI vehicular homicide"), uses presumptive language and this is a strict liability offense. Accordingly, a person may commit vehicular homicide either by driving in a reckless manner or by driving under the influence of alcohol or drugs. *Frazier v. People*, 90 P.3d 807 (2004).

FLORIDA

Fla. Stat. § 316.193(3) (DUI manslaughter) does not require a causal connection between the intoxication and the resulting fatality, neither specific intent nor a causal connection between the prohibited act of driving while intoxicated and the resulting death are elements of DUI manslaughter. *State v. Hubbard*, 751 So.2d 552 (1999) (clarifying, *Magaw v. State,* 537 So.2d 564 (1989), as being misinterpreted to require causation as an element of DUI manslaughter).

GEORGIA

OCGA § 40-6-393(a) (homicide by vehicle) requires proof that defendant drove a vehicle under the influence of alcohol in violation of OCGA § 40-6-391, (DUI) thereby causing death. *David v. State*, 261 Ga. App. 468, 583 S.E.2d 135 (2003).

IOWA

Iowa Code § 707.6A(1) (homicide by vehicle), is a per se statute. *State v. Dohlman*, No. 94/05-0581 (2006).

The elements of the crime charged, which the State must prove beyond a reasonable doubt, are that (1) Defendant was operating a motor vehicle while under the influence of alcohol or other drug or a combination of such substances, and (2) this act **unintentionally** caused the death of another. Iowa Code §§ 707.6A(1), 321J.2(1)(a). *State v. Buchanan*, No. 4-103/03-0395 (2004).

KANSAS

K.S.A. 1986 Supp. 21-3405a (Aggravated vehicular homicide) is a per se statute. But *see*, *State v. Woodman*, 12 Kan. App. 2d 110, 735 P.2d 1102 (1987) (proximate cause jury instruction required)

KENTUCKY

KRS 507.040(1) and KRS 501.020(3) (second degree manslaughter) is a per se statute. *Ward v. Commonwealth*, No. 2007-CA-000753-MR (2008) (when one drives an automobile while voluntarily intoxicated and causes a death, he has violated the law and will be subject to prosecution for second-degree manslaughter).

MICHIGAN

MCL 257.625(4) (OUIL causing death), is a per se statute. It provides: A person, who operates a motor vehicle in violation of subsection (1) under the influence of alcoholic liquor . . . and by the operation of that motor vehicle causes the death of another person is guilty of a felony. *People v. Schaefer*, 703 N.W.2d 774, 473 Mich. 418 (2005) (*overruling, People v. Lardie*, 452 Mich. 231, 551 N.W.2d 656 (1996)) (The plain text of § 625(4) requires no causal link between the defendant's intoxication and the victim's death).

MINNESOTA

Minn. Stat. § 609.21, subds. 1(3), 2a(3) (vehicular homicide) no longer requires proof of negligence as a separate element. *State v. Condon*, 497 N.W.2d 272, 276 (1993). ("Whoever causes the death of a human being as a result of operating a motor vehicle, while having an alcohol concentration of 0.10 or more is guilty of criminal vehicular homicide).

NEBRASKA

Nebraska's motor vehicle homicide statute provides: A motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306(DUI), which causes "the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska." *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003) (the jury could have found

that the defendant operated a motor vehicle in violation of the law in one of three ways: (1) while under the influence of alcoholic liquor, or (2) when he had more than the legal limit of alcohol in his body fluids, or (3) in a reckless manner).

NEW JERSEY

New Jersey has a per se vehicular homicide statute. *State v. Stanton*, 176 N.J. 75, 820 A.2d 637 (2003) Criminal homicide constitutes vehicular homicide when it is caused by driving a vehicle or vessel recklessly. N.J.S.A. 2C:11-5a. The recklessness element may be satisfied by proof of intoxication alone or in combination with other evidence. *State v. Stanton*, 176 N.J. 75, 820 A.2d 637 (2003).

NEW MEXICO

New Mexico has a per se statute. *State v. Downey*, 145 N.M. 232, 195 P.3d 1244 (2008). Homicide by vehicle is defined as "the killing of a human being in the unlawful operation of a motor vehicle." NMSA 1978, § 66-8-101(A) (1991). Any person who commits homicide by vehicle while under the influence of intoxicating liquor, or while driving recklessly in violation of NMSA 1978, § 66-8-113 (1987) commits a felony. § 66-8-101(C). UJI 14-240 NMRA 2003, requires operation of a motor vehicle while under the influence of intoxicating liquor or in a reckless manner and thereby caused the death of the victim. UJI 14-240. The charge is predicated on two alternate

theories of culpability: (1) operation of a motor vehicle while under the influence of intoxicating liquor, contrary to NMSA 1978, § 66-8-102 (1953); and (2) operation of a motor vehicle in a reckless manner, contrary to NMSA 1978, Section 66-8-113.

NORTH CAROLINA

North Carolina is a per se state. "The elements of felony death by vehicle are: (1) defendant unintentionally causes the death of another; (2) while driving impaired as defined by N.C. Gen. Stat. §§ 20-138.1 or 20-138.2 (2007); and (3) the impairment was the proximate cause of the death." *State v. Bailey*, 184 N.C. App. 746, 748, 646 S.E.2d 837, 839 (2007) (citing N.C. Gen. Stat. § 20-141.4(a1)). Negligence consisting of driving while impaired, will support a conviction of either felony death by vehicle or involuntary manslaughter. *State v. Davis*, 680 S.E.2d 239 (2009).

OHIO

Ohio does not require proof of negligent driving. *State v. Mayl*, 106 Ohio St.3d 207, 833 N.E.2d 1216 (2005). Ohio Rev. Code 2903.06(A) provides: "No person, while operating a motor vehicle, shall cause the death of another in any of the following ways:

(1) As the proximate result of committing a violation of division (A) of section 4511.19 of the Ohio Rev. Code or of a substantially equivalent municipal ordinance." (driving with a prohibited concentration

(Ohio Rev. Code 4511.19(A)(1)(b) through (i) and (B)). *State v. Mayl*, 106 Ohio St.3d 207, 833 N.E.2d 1216 (2005). *State v. Hatfield*, 2007 –Ohio– 7130 (2007).

OREGON

Oregon appears to have a per se statute, manslaughter in the first degree, ORS 163.118, arising out of an alcohol-related vehicle accident. *State v. Hardman*, 196 Or. App. 522, 102 P.3d 722 (2004) (manslaughter in the first degree, required the state to prove that defendant committed criminal homicide "recklessly under circumstances manifesting extreme indifference to the value of human life.") ORS 163.118(1)(a) (prior bad acts as proof of indifference to human life).

PENNSYLVANIA

Pennsylvania is a per se state. *Commonwealth v. Thur*, 906 A.2d 552, 2006 PA Super 208 (2006) 75 Pa. C.S.A. § 3735. Homicide by vehicle while driving under the influence. (a) Offense defined. – Any person who unintentionally causes the death of another person as the result of a violation of 75 Pa. C.S.A. § 3802 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating section 3802 is guilty of a felony of the second degree when the violation is the cause of death.

RHODE ISLAND

Rhode Island's per se statute has been interpreted to require a causal connection between the defendant's driving and the death. *State v. Benoit*, 650 A.2d 1230, 1232 (1994) (Driving under the influence of liquor or drugs, resulting in death), 31-27-2.2, "When the death of any person other than the operator ensues as a proximate result of an injury received by the operation of any vehicle, the operator of which is under the influence of any intoxicating liquor, the person so operating such vehicle shall be guilty of 'driving under the influence of liquor or drugs, resulting in death.'"

To sustain a conviction under 31-27-2.2(a), the state must produce sufficient evidence for a jury to conclude that the defendant's manner of operating his or her motor vehicle was a proximate cause of the victim's death and that the collision occurred while the defendant was legally intoxicated. *State v. Benoit*, 650 A.2d 1230, 1232 (1994).

TENNESSEE

Tennessee does not require a causal connection between defendants driving and death, *State v. Scott*, No. M2006-02067-CCA-R3-CD (2008). Vehicular homicide, "the reckless killing of another by the operation of an automobile, airplane, motorboat or other motor vehicle, as the proximate result of . . . [t]he driver's intoxication, as set forth in § 55-10-401." T.C.A. § 39-13-213(a)(2). T.C.A. § 55-10-408

provides that "evidence that there was, at the time alleged, eight-hundredths of one percent (.08%) or more by weight of alcohol in the defendant's blood shall create a presumption that the defendant's ability to drive was sufficiently impaired thereby to constitute a violation of T.C.A. § 55-10-401(a)(1).

TEXAS

Texas has a per se statute. A person commits manslaughter if he recklessly causes the death of an individual. Texas Penal Code § 19.04(a). A person commits intoxication manslaughter (to the extent relevant here) if he operates a motor vehicle in a public place, is intoxicated, and by reason of that intoxication causes the death of another by accident or mistake. Texas Penal Code § 49.08. Manslaughter requires "recklessness," which is not required for intoxication manslaughter. Intoxication manslaughter requires "intoxication" and "the operation of a motor vehicle in a public place," neither of which are required for manslaughter. *Ex Parte Ervin*, 991 S.W.2d 804 (1999).

VERMONT

Vermont has a per se statute. Operating a motor vehicle while under the influence of intoxicating liquor, 23 V.S.A. § 1201(a)(2), with death resulting, 23 V.S.A. § 1210(e) (DUI/Fatal), 23 V.S.A. § 1210(e) (DUI/Fatal), and, secondly, operating a motor vehicle "in a careless or negligent manner" with death resulting.

23 V.S.A. § 1091(C) *State v. Yudichak*, 151 Vt. 400, 403, 561 A.2d 407, 409 (1989) (the jury must . . . find that the [illegal] act or natural result of the act of the defendant is the cause of death; not merely a cause of death). *See also*, *State v. Martin*, 2007 Vt. 96 (2007) (the court in *Yudichak* correctly instructed that defendant's actions must be a cause, rather than the sole cause, of the accident).

VIRGINIA

Virginia is a per se state. Va. Code § 18.2-36.1 provides as follows: A. Any person who, as a result of driving under the influence in violation of clause (ii), (iii), or (iv) of Va. Code § 18.2-266 or any local ordinance substantially similar thereto unintentionally causes the death of another person, shall be guilty of involuntary manslaughter. *See*, *Payne v. Commonwealth*, No. 081258 (2009).

WASHINGTON

Washington has a per se statute. *State v. Roggenkamp*, 153 Wash. 2d 614, 106 P.3d 196 (2005) (operating or driving a vehicle in a reckless manner, not driving recklessly, was an element of the crime).

There are three alternative means of committing both vehicular homicide and vehicular assault. *Roggenkamp*, 115 Wn. App. at 935. These offenses can be committed in three alternative ways: by operating a motor vehicle either while under the influence of

intoxicating liquor or any drug, in a reckless manner, or with disregard for the safety of others. RCW 46.61.520, .522.

"Statutes which have a causation component"

ALABAMA

Alabama's vehicular-homicide statute, Ala. Code § 32-5A-192, has been interpreted to require proof of a culpable mental state, *Ex Parte Edwards*, 816 So.2d 98 (2001).

ARKANSAS

Ark. Code Ann. § 5-10-105(a)(1)(A) (felony negligent homicide), requires proof that the defendant caused the death of another person as a result of operating a vehicle while intoxicated. *See*, *Robinson v. State*, 98 Ark. App. 237, 254 S.W.3d 750 (2007) (evidence of merely ingesting a controlled substance, without further proof of actual intoxication or impairment, was not sufficient to prove the necessary element of intoxication.

CALIFORNIA

Cal. Veh. Code § 23153(b) (felony negligent driving) requires proof of negligent driving). *People v. Weems*, 54 Cal. App. 4th 854, 858, 62 Cal. Rptr. 2d 903 (1997); (State must present evidence of an unlawful act or neglect of duty beyond the act of driving

with a blood alcohol level of 0.08 or above; however, the unlawful act or omission "'need not relate to any specific section of the Vehicle Code, but instead may be satisfied by the defendant's ordinary negligence. [Citations omitted.]'" *Weems*, 54 Cal. App. 4th at 858.

CONNECTICUT

Conn. Stat. 53a-56b(a) provides: "A person is guilty of manslaughter in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as a consequence of the effect of such liquor or drug." *State v. Ortiz*, 29 Conn. App. 825, 618 A.2d 547 (1993); *State v. Kristy*, 11 Conn. App. 473, 482, 528 A.2d 390 (1987). *See also*, *State v. McKenna*, 11 Conn. App. 122, 525 A.2d 1374 (1987); *Ricky A. McCoy v. Commissioner of Public Safety*, No. SC 18545 (2011).

DELAWARE

Delaware Code Section 4. Amend. Chapter 6, Title 11: Section 630A (Vehicular Homicide), requires proof of negligent driving. A person is guilty of vehicular homicide in the first degree when while in the course of driving or operating a motor vehicle under the influence of alcohol or drugs, as defined by 21 Del. Code § 4177, his criminally negligent driving or operation of said vehicle causes the death of another person.

ILLINOIS

Illinois Criminal Code Section 9-3(b) of the Code provided that: "In cases involving reckless homicide, being under the influence of alcohol or any other drug or drugs at the time of the alleged violation shall be presumed to be evidence of a reckless act unless disproved by evidence to the contrary." 720 ILCS 5/9-3(b). It has been held unconstitutional. *People v. Hester*, 131 Ill. 2d 91, 98 (1989). (Any statute which punishes a driver for homicide without requiring the state to prove the causal connection between wrongful conduct that is, the driver's intoxication or the driver's faulty operation of the vehicle while under the influence of an intoxicant and the harm (death) is unconstitutional). *People v. Hester*, 131 Ill. 2d 91, 98 (1989).

INDIANA

Indiana Code Section 9-30-5-5 requires proof that the intoxication causes the death. *Micinski v. State*, 487 N.E.2d 150, 154 (1986); *Stephenson v. State*, 648 N.E.2d 395 (1995); *Abney v. State*, 766 N.E.2d 1175 (2002).

LOUISIANA

LSA-R.S. 14:32.1, is a per se statute. But, in *State v. Shane Trahan*, 637 So.2d 694 (1994); *State v. Taylor*, 463 So.2d 1274, 1275 (1985) (Louisiana Supreme Court concluded that, under the vehicular homicide statute, "the state . . . must prove that an

offender's unlawful blood alcohol concentration combined with his operation of a vehicle to cause the death of a human being.") *See also State v. Ritchie*, 590 So.2d 1139, 1149 (1991) (It is insufficient for the state to prove merely that the alcohol consumption "coincides" with the accident). And *see*, *State v. Archer*, 619 So.2d 1071, 1074 (1993) (Causation is a question of fact which should be considered in light of the totality of circumstances surrounding the ultimate harm and its relation to the actor's conduct. *State v. Kalathakis*, 563 So.2d 228, 231 (1990)).

MAINE

17-A M.R.S.A. §§ 35(3), 35(4) (1983) (Maine's drunk driving law appears to be interpreted to require a causal connection between negligent driving and injury. In *State v. Snow*, 464 A.2d 958 (1983)) (the jury could logically have inferred that defendant was recklessly or negligently operating his automobile, either too fast for the condition of the road or too fast for his state of intoxication).

MARYLAND

Article 27 of the Maryland Code, Section 388A (Homicide by motor vehicle while intoxicated), requires proof of negligent driving. *Coates v. Maryland*, 90 Md. App. 105, 600 A.2d 856 (1992). *See*, *Blondes v. Hayes*, 29 Md. App. 663, 668, 350 A.2d 163 (1976), (court instructed the jury not to consider intoxication on the question of guilt or innocence unless they

found that the accident was caused by one of the motorcyclists).

MASSACHUSETTS

G.L. c. 90, § 24G(a) (felony motor vehicle homicide), requires that the motor vehicle was operated in a reckless or negligent manner so that the lives or safety of the public might have been endangered; and fifth, that such operation caused the death of another person. In, *Commonwealth v. Dyer*, 934 N.E.2d 293, 77 Mass. App. Ct. 850 (2010).

In, *Commonwealth v. Dyer*, the jury asked, "Does operating a vehicle when you have consumed alcohol and are under the influence of alcohol constitute negligence in and of itself? Does the above constitute one of the physical factors or conditions of negligence?" The judge repeated a portion of his original charge upon the factors probative of negligence and explained further that operation of a vehicle after consumption of alcohol or under the influence of alcohol does not constitute negligence in and of itself, but that evidence of consumption can join with other evidence as a factor toward proof of negligence. This guidance did not confuse or commingle the separate elements of impairment and negligence.

MINNESOTA

Criminal Minn. Stat. § 609.21 (vehicular homicide), occurs when a person operates a vehicle in a

grossly negligent manner and thereby causes the death of another person. *See*, *State v. Cid*, No. A08-2266 (2010). And, *State v. Gibson*, No. A03-1713 (2004). And *see*, *State v. Seeler*, 316 S.W.3d 920 (2010) ("the law is confusing for lawyers and judges to discern the essential elements of class B involuntary manslaughter, but the conduct proscribed is clear enough. The law is confusing, but not vague").

MISSISSIPPI

Mississippi Code Annotated Section 63-11-30 (Supp. 2007) (vehicular homicide) provides: (5) Every person who operates any motor vehicle in violation of the provisions of subsection (1) (alcohol of .08 or more) of this section and who in a negligent manner causes the death of another . . . shall, upon conviction, be guilty of a separate felony for each such death . . . *Smith v. State*, 981 So.2d 1025 (2008) (defendant was at fault because he either ran the stop sign or he failed to yield admitted drinking and his blood alcohol content was 0.22, almost three times the legal limit).

MISSOURI

Missouri is not a per se state. Missouri Code Section 565.024 (Involuntary manslaughter), provides: A person commits the crime of involuntary manslaughter if he or she . . . (c) Cause the death of any person while he or she has a blood alcohol content of at least eighteen-hundredths of one percent by weight or alcohol in such person's blood.

MONTANA

Montana Code Section 45-5-104(1), MCA, 45-2-101(42) (negligent homicide) require proof of negligent driving. Intoxication is not an essential element of negligent homicide. Intoxication is merely one of the factors to be considered in determining whether the death was caused by the negligent actions of the driver. *State v. English*, 333 Mont. 23, 140 P.3d 454 (2006).

NEW HAMPSHIRE

New Hampshire requires proof of negligent driving. RSA 630:3; *State v. Wong*, 125 N.H. 610, 620 (1984) (to sustain a conviction under RSA 630:3, the State must establish a causal connection between the person's driving under the influence, the subsequent collision and the resulting death. *State v. Whittaker*, 973 A.2d 299 (2009).

NEW YORK

Causation is an issue in New York's reckless homicide statute. New York Penal Law §§ 120.03(1), 120.04(1), 125.14(1),(5), 125.13(1). *See People v. Santos*, No. 2798N/07 (2008) (offense contains the element that the defendant, as a result of intoxication, operated a vehicle in such a manner as to cause the serious physical injury or death). Causation is an issue in New York's reckless homicide statute.

NORTH DAKOTA

Negligent homicide prosecutions under N.D.C.C. § 12.1-16-03, require proof of negligent driving while evidence of alcohol consumption is used at sentencing. *State v. Steen*, 2000 N.D. 152, 615 N.W.2d 555 (2000).

OKLAHOMA

Oklahoma requires proof of negligent driving. *Bell v. State*, 2007 OK CR 43 (2007). State must show driving a motor vehicle and her ability to drive was impaired by alcohol. *See also*, Misdemeanor Manslaughter in violation of 21 O.S. 2001, § 711(1), (a) the driver's ability to operate the vehicle was so affected by alcohol that public health and safety was threatened, or (b) the driver violated a state statute or local ordinance in the vehicle's operation.

SOUTH CAROLINA

South Carolina appears to require proof of negligent driving. *State v. Easler*, 322 S.C. 333, 471 S.E.2d 745 (1996). The elements of felony DUI causing death are stated in *State v. Cribb*, 310 S.C. 518, 523, 426 S.E.2d 306, 309 (1992) (citing *State v. Grampus*, 288 S.C. 395, 397, 343 S.E.2d 26, 27 (1986)). *See also* S.C. Code Ann. § 56-5-2945 (Supp. 1994). Felony DUI requires proof of three elements: 1) the actor drives a vehicle while under the influence of alcohol and/or drugs; 2) the actor does an act forbidden by law or

neglects a duty imposed by law; and 3) the actor's neglect proximately causes great bodily injury or death to another person.

SOUTH DAKOTA

South Dakota requires proof of negligent driving as proximate cause of death, and allows for the affirmative defense of contributory negligence as an intervening cause. *State v. Lamont*, 2001 S.D. 92, 631 N.W.2d 603 (2001). The jury instruction for vehicular homicide, in pertinent part, read as follows: The state must prove beyond a reasonable doubt: 1. That the defendant at the time and place alleged in the Information operated or drove a motor vehicle in a negligent manner. 2. That the defendant at the time and place was under the influence of an alcoholic beverage. 3. That the negligent operation or driving was a proximate cause of the death. 4. That the defendant did so without a design to effect the death. This instruction reflects a correct statement of law. *State v. Two Bulls*, 1996 SD 53, 547 N.W.2d 764, 766 (1996).

WEST VIRGINIA

West Virginia requires proof of negligent driving. *State v. Green*, 220 W. Va. 300, 647 S.E.2d 736 (2007). Negligent homicide statute, W. Va. Code, 17C-5-1, requires driving a vehicle in reckless disregard of the safety of others, and this means that more than negligence is required. It is compatible with the

involuntary manslaughter standard set in *State v. Lawson*, 128 W. Va. 136, 36 S.E.2d 26 (1945); *State v. Vollmer*, 163 W. Va. 711, 259 S.E.2d 837 (1979).

WYOMING

Aggravated vehicular homicide in violation of Wyo. Stat. Ann. § 6-2-106(b) is a per se statute. *Allen v. State*, 2002 WY 48, 43 P.3d 551 (2002). A person is guilty of aggravated homicide by vehicle if: (i) While operating or driving a vehicle in violation of Wyo. Stat. Ann. §§ 10-6-103, 31-5-233 or 41-13-206, he causes the death of another person and the violation is the proximate cause of the death; or (ii) He operates or drives a vehicle in a reckless manner, and his conduct is the proximate cause of the death of another person. Wyo. Stat. Ann. § 6-1-104(a)(iii) (1997); *Allen v. State,* 2002 WY 48, 43 P.3d 551 (2002).

CONCLUSION

This Court should grant the instant Petition for *Certiorari* because a growing number of states, including Wisconsin, have drafted homicide statutes relating to intoxicated use of motor vehicle which eliminate the element of causation from the government's prima facie case. Such a growing statutory scheme is the manifestation of this Court's concerns and warning as set forth in *Mullaney, supra*, that (if *Winship* were limited to those facts that constitute a crime as defined by state law, the state could

undermine any of the interest that decision sought to protect without affecting any substantive changes in this law). *Mullaney*, 421 U.S. at 699, 95 S.Ct. at 1889. Furthermore, the critical bedrock principle of the burden of proof of causation must be uniform throughout the States as its application is not limited merely to vehicular homicide statutes, but can be extended to more serious crimes; such as homicide. As such, this Court should act, and grant *Certiorari*, in order to restate and clarify the due process requirements as set forth in *Winship, Sandstrom, Francis*, and *Mullaney*.

For all of the reasons set forth above, the Petitioner, DAWN LUDWIG, petitions for leave to appeal so that this Court can critically re-examine the application of the relevant statutes to the instant case, or reverse and remand this matter to the circuit court for a new trial

Dated: April 11, 2011

Respectfully submitted,

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COURT OF APPEALS DECISION DATED AND FILED

August 31, 2010

A. John Voelker Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* **WIS. STAT. § 808.10 RULE 809.62.**

Appeal No. 2009AP1724-CR **Cir. Ct. No. 2006CF663**

STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAWN M. LUDWIG,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dawn Ludwig pled no contest to two counts of homicide by intoxicated use of a motor vehicle, three counts of first-degree reckless endangerment, and one count of operating a motor vehicle while intoxicated, third offense. Ludwig appeals the circuit court's judgment of conviction and order denying postconviction relief. She argues Wisconsin's homicide by intoxicated use of a motor vehicle statute, WIS. STAT. § 940.09,[1] is unconstitutional. She also contends the circuit court erred by denying her ineffective assistance of counsel claim and her motion to withdraw her no contest pleas without an evidentiary hearing. We affirm.

BACKGROUND

¶2 In the early morning hours of June 25, 2006, Ludwig's motor vehicle was traveling southbound in the northbound lane of United States Highway 41. Another motorist honked his horn at Ludwig in attempt to get her attention, but Ludwig continued driving the wrong way without deviating or changing direction. Minutes later, Ludwig collided head-on with a vehicle traveling northbound, killing the two occupants of that vehicle.

¶3 At the accident scene, sergeant Nathan Thompson noted that Ludwig's speech was "slurred" and "thick-tongued" and that she had difficulty

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

controlling her fine motor skills. Ludwig told officer Zachary Roush that she had consumed a few drinks before the accident. Officer Ryan Glime observed that Ludwig's eyes were red and her breath smelled of alcohol. A preliminary breath test indicated Ludwig had a .20% blood alcohol concentration.

¶4 Ludwig pled no contest and was convicted of two counts of homicide by intoxicated use of a motor vehicle, three counts of first-degree reckless endangerment, and one count of operating a motor vehicle while intoxicated, third offense. Ludwig sought postconviction relief, contending that WIS. STAT. § 940.09 is unconstitutional and that she was denied effective assistance of counsel. She also moved to withdraw her no contest pleas, alleging they were not entered knowingly and voluntarily due to ineffective assistance of counsel. The circuit court dismissed Ludwig's claims of unconstitutionality, and denied her ineffective assistance claim and motion to withdraw her pleas without a hearing. Ludwig appeals the judgment of conviction and the circuit court's order denying postconviction relief.

DISCUSSION

¶5 On appeal, Ludwig argues WIS. STAT. § 940.09 is unconstitutional. She further contends she was denied effective assistance of counsel. She finally argues the circuit court erred by denying her request to withdraw her no contest pleas.

I. The constitutionality of WIS. STAT. § 940.09

¶6 WISCONSIN STAT. § 940.09(1)(a) states that a person commits a class D felony who "[c]auses the death of another by the operation or handling of a vehicle while under the influence of an intoxicant." However, the statute provides an affirmative defense if the defendant proves by a preponderance of the evidence that the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant. WIS. STAT. § 940.09(2)(a).

¶7 Ludwig contends WIS. STAT. § 940.09(1)(a) is unconstitutional in that it does not require a causal connection between the intoxicated condition of the motor vehicle operator and another person's death. She also asserts the affirmative defense provision in § 940.09(2)(a) invades her right to be presumed innocent and her Fifth Amendment right against self-incrimination. As such, Ludwig argues the constitutional defect in § 940.09(1)(a) is not cured by the affirmative defense.

¶8 In ***State v. Caibaiosai***, 122 Wis. 2d 587, 363 N.W.2d 574 (1985), our supreme court considered and rejected the same constitutional arguments Ludwig now raises. ***Caibaiosai*** held that WIS. STAT. § 940.09(1)(a) is not rendered unconstitutional by its failure to require a causal connection between the defendant's intoxication and the victim's death. ***Id.*** at 593-94. ***Caibaiosai*** also held that the affirmative defense provision in § 940.09(2)(a) does not violate a

defendant's Fifth Amendment right against self-incrimination. ***Id.*** at 596-98. The ***Caibaiosai*** majority did not adopt the dissent's belief that "the effect of sec. 940.09(2) is that the accused must prove himself or herself innocent." ***Id.*** at 606 (Abrahamson, J., dissenting). In 2005, the supreme court declined to overrule ***Caibaiosai***, noting, "Our reasoning in ***Caibaiosai*** is sound." ***State v. Fonte***, 2005 WI 77, ¶38, 281 Wis. 2d 654, 698 N.W.2d 594.

¶9 We are bound by prior Wisconsin Supreme Court decisions. ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984). The Wisconsin Supreme Court is the only state court with the power to overrule, modify, or withdraw language from a previous supreme court decision. ***Cook v. Cook,*** 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). We therefore decline Ludwig's request to "revisit" the constitutionality of WIS. STAT. § 940.09.

II. Ineffective assistance of counsel

¶10 To establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must identify specific acts or omissions that form the basis of ineffective assistance and must show that counsel's performance fell below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994) (citing ***Strickland***, 466 U.S. at 687-88, 690). The court must

then determine whether, under the circumstances, the act or omission was outside the range of professionally competent assistance. ***Strickland***, 466 U.S. at 690. The court must presume that counsel provided adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Id.***

¶11 Second, a defendant must show that counsel's deficient performance prejudiced the defendant. ***Id.*** at 687. The defendant must demonstrate "there is a reasonable probability that, but for [the errors], the result of the proceeding would have been different." ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 694). When a defendant has entered a no contest plea, the defendant must show there is a reasonable probability that, but for counsel's errors, the defendant would not have pled no contest and would have insisted on going to trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶12 We will not review a claim of ineffective assistance of counsel unless trial counsel has testified at a postconviction evidentiary hearing. *See* ***State v. Cox***, 2007 WI App 38, ¶6, 300 Wis. 2d 236, 730 N.W.2d 452 (citations omitted). A defendant raising a claim of ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. A circuit court is only required to conduct a hearing when the defendant alleges sufficient material facts that, if true, entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). If the

defendant does not raise sufficient facts, if the allegations are merely conclusory, or if the record conclusively shows the defendant is not entitled to relief, the circuit court has the discretion to deny a request for an evidentiary hearing. ***Id.*** at 309-10. Whether a postconviction motion alleges sufficient facts to warrant an evidentiary hearing is a legal issue that we review independently. ***Id.*** at 310.

¶13 Ludwig argues she was denied effective assistance of counsel because her trial counsel: (1) failed to investigate how her medical condition, benign positional vertigo, affected her ability to drive; (2) failed to advise her that her medical condition could constitute an affirmative defense under WIS. STAT. § 940.09(2)(a); (3) failed to conduct an accident reconstruction; and (4) failed to discover discrepancies in the blood alcohol testing. The circuit court concluded Ludwig's postconviction motion failed to allege sufficient facts which, if true, would entitle her to relief. It therefore denied Ludwig's ineffective assistance claim without an evidentiary hearing. We agree with the circuit court.

¶14 First, contrary to Ludwig's assertions, her trial counsel did investigate her medical condition, benign positional vertigo. Within two months after the State filed its criminal complaint against Ludwig, her trial counsel had written multiple letters to her medical providers requesting health records pertaining to her condition. Thus, it cannot be said that Ludwig's trial counsel did not investigate her medical condition and consider it as a possible

defense. Ludwig has not explained why it was unreasonable for her attorney to fail to pursue this avenue of defense. Her trial counsel's performance was not deficient in this respect.

¶15 While Ludwig makes much of the fact that she has a history of suffering from benign positional vertigo, she has never alleged that she suffered from symptoms associated with that condition on the night of the crash. She has not made any effort to explain how the symptoms associated with benign positional vertigo – dizziness, veering to the left, and loss of balance – would cause her to enter the freeway from the wrong direction, ignore another motorist's honking, and continue driving her vehicle without deviating until she crashed into another car head-on. Given these facts, a reasonable attorney could have concluded that Ludwig's medical condition did not constitute an affirmative defense under WIS. STAT. § 940.09(2)(a).

¶16 Second, although Ludwig contends she was never advised of the affirmative defense under WIS. STAT. § 940.09(2)(a), the trial court's plea colloquy suggests otherwise. Ludwig's plea questionnaire included the jury instruction for homicide by operation of a vehicle while under the influence. That jury instruction specifically detailed the affirmative defense set forth in § 940.09(2)(a). Ludwig confirmed to the trial court that she had reviewed the jury instruction with her attorney in its entirety and had no questions about it. Ludwig cannot now credibly claim that she was unaware of the affirmative defense set

forth in § 940.09(2)(a). Therefore, her trial counsel's performance was not deficient in this respect.

¶17 Third, while Ludwig's trial counsel did not conduct his own accident reconstruction, he did seek information from the State regarding its reconstruction. On September 14, 2006, Ludwig's counsel moved to compel discovery of the State's accident reconstruction report. On March 7, 2007, he filed another motion requesting the underlying data used in the State's reconstruction. On August 3, 2007, he again moved to compel discovery of specific information about the reconstruction. He attached a letter from a consulting engineer to his motion outlining information missing from the State's reconstruction report. Ludwig's trial counsel adequately explored this topic, and Ludwig has not shown how his performance in this respect was deficient.

¶18 Furthermore, even if Ludwig's trial counsel was deficient in not conducting his own accident reconstruction, Ludwig cannot show prejudice. The affirmative defense under WIS. STAT. § 940.09(2)(a) was only available if Ludwig could prove by a preponderance of the evidence that the deaths would have occurred even if she had been exercising due care and had not been under the influence of an intoxicant. Ludwig could not have met this burden because, had she been exercising due care on the night in question, the deaths would not have occurred. Had Ludwig exercised due care, she would have realized that she was driving the wrong way down a highway before the head-on collision. Thus,

even if her counsel had conducted his own accident reconstruction, it is doubtful that Ludwig would have been entitled to an instruction on § 940.09(2)(a), Without such an instruction, Ludwig cannot credibly maintain that she would have exercised her right to a jury trial. Indeed, Ludwig fails to identify any errors or omissions in the State's report that an independent reconstruction would have cured. Trial counsel's failure to conduct his own accident reconstruction therefore did not prejudice Ludwig.

¶19 Fourth, although Ludwig mentions her trial counsel's failure to discover discrepancies in the blood alcohol testing, she does not develop this claim adequately in her brief. We therefore disregard this argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

¶20 Ludwig has not alleged sufficient material facts that, if true, entitle her to relief on her ineffective assistance of counsel claim. Given the facts, a reasonable attorney could have concluded that Ludwig did not exercise due care on the night of the crash, was highly intoxicated, and had no affirmative defense under WIS. STAT. § 940.09(2)(a), or that any such defense had little likelihood of success. Accordingly, the circuit court properly denied Ludwig's ineffective assistance of counsel claim without an evidentiary hearing.

III. Ludwig's motion to withdraw her no contest pleas

¶21 To withdraw a no contest plea after sentencing, a defendant "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A defendant can establish manifest injustice by proving ineffective assistance of counsel, ***Bentley***, 201 Wis. 2d at 311, or by showing that the plea was not entered knowingly, intelligently, and voluntarily. ***Brown***, 293 Wis. 2d 594,118.

¶22 Ludwig contends the circuit court erred in denying her motion to withdraw her no contest pleas because she did not enter them knowingly, intelligently, and voluntarily due to the ineffective assistance of her trial counsel. This argument parallels Ludwig's ineffective assistance argument and fails for the same reasons. Just as Ludwig cannot establish that the circuit court erred in denying her ineffective assistance claim, she cannot establish that the circuit court erred in denying her motion to withdraw on the same basis. The circuit court did not err in denying Ludwig's motion to withdraw her no contest pleas.

By the Court. – Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN	CIRCUIT COURT BRANCH V	BROWN COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

DAWN LUDWIG,
Defendant.

DECISION/ORDER
(Filed Jun. 12, 2009)
Case No: 06 CF 663

HOLDING

Defendant's Claims of Unconstitutionality are **dismissed**.

Defendant's Motion to Withdraw Plea is **denied**.

Defendant's Motion to Modify Sentence is **denied**.

BACKGROUND

On June 25, 2006, defendant, driving south in the northbound lane of U.S. Highway 41 (hereinafter Hwy 41), struck an oncoming vehicle occupied by Por Vang and Chou Thao killing both of them. This accident occurred around 2:25 a.m. A Complaint was filed on June 26, 2006 wherein defendant was charged with two counts of Homicide by Intoxicated Use of a Vehicle and one count of Operating a Motor Vehicle While Intoxicated-4th Offense.

A Preliminary Hearing was held on July 5, 2006, and the State called four witnesses. Martin LaGrow testified that he was driving north on Hwy 41 in the right lane when he saw oncoming headlights in the left lane. Mr. LaGrow stated that he slowed down,

pulled over to the right, and honked his horn as the vehicle advanced in his direction. Mr. LaGrow further testified that, as far as he could tell, the vehicle did not react when he honked his horn. (Transcript of Preliminary Hearing, 41:12-20).

EXHIBIT 1. Holding

Ryan Glime, a police officer for the City of DePere, testified that while on duty that early Sunday morning he had responded to a call that indicated a vehicle was driving against traffic on Hwy 41, and that the vehicle was at Main Avenue approaching Scheuring Road. Officer Glime stated that while attempting to locate the vehicle, he received information from Dispatch that the vehicle driving against traffic had now caused a head-on collision on Hwy 41. Officer Glime estimated that the crash occurred in the northbound lane of Hwy 41 about 500 feet north of Schuering Road. Officer Glime further testified that, at the hospital, after he observed defendant's eyes to be red and found that her breath smelled of alcohol, he conducted a Preliminary Breath Test on defendant, which indicated a .20 percent breath alcohol concentration. (Transcript of Preliminary Hearing, 35-38).

Nathan Thompson, a sergeant at the DePere police department, testified that at the scene of the accident he "could distinctly detect a slurred thick-tongued speech emanating from the driver" and that he noticed defendant had difficulty controlling her fine motor skills while attempting to retrieve her

driver's license from her purse. (Transcript of Preliminary Hearing, 51:25; 52:1-2; 61:10-17). Another police officer, Zachary Roush, testified that, at the scene of the accident, he noticed defendant's eyes were red and glossy, and that she appeared disoriented as to where she was and where she was going. (Transcript of Preliminary Hearing, 69:15-16; 88:11-25; 88:1-21; 90:1-20).

Defendant was ultimately charged with eight counts: two counts of Homicide by Intoxicated Use of a Vehicle, two counts of Homicide by Use of Vehicle While Having a Prohibited Alcohol Concentration, three counts of First Degree Reckless Endangerment and one count of Operating a Motor Vehicle While Intoxicated-3rd Offense. (See Third Amended Information filed on September 11, 2007).

On September 11, 2007 defendant pled no contest to two counts of Homicide by Intoxicated Use of a Vehicle (Counts 1 and 3), three counts of First Degree Reckless Endangerment (Counts 5, 6 and 7) and one count of Operating a Motor Vehicle While Intoxicated-3rd Offense (Count 8). The two counts of Homicide by Use of Vehicle While Having a Prohibited Alcohol Concentration (Counts 2 and 4) were dismissed. Defendant and the State stipulated that the facts stated in the Complaint and in the Preliminary Hearing would provide the factual basis upon which the court would accept defendant's pleas and upon which it would base its decision at sentencing. (Transcript of Final Conference, 18:14-25).

At the sentencing hearing, held on December 5, 2007, the Court noted that two particular aggravating factors existed in this case. First, defendant was highly intoxicated, having a blood alcohol concentration two and a half times the legal limit. Second, defendant was driving the wrong way on a freeway, in the early morning hours before dawn, which made it difficult for other drivers to see and avoid her.

The Court sentenced defendant to seven and one-half years of initial confinement and five years of extended supervision on Count 1; seven and one-half years of initial confinement and five years of extended supervision on Count 3, consecutive to Count 1; one year of initial confinement and two years of extended supervision on Count 5, consecutive to Counts 1 and 3; one year of initial confinement and two years of extended supervision on Count 6, concurrent with Count 5; one year of initial confinement and two years of extended supervision on Count 7, concurrent with Counts 5 and 6; six months of incarceration on Count 8, concurrent with the other counts.

On July 14, 2008, defendant filed a Notice of Claim of Unconstitutionality, a Motion to Withdraw Plea and a Motion to Modify Sentence. In the Notice of Claim of Unconstitutionality she asserts that Wisconsin Statutes sections 940.09(1)(a) and 940.09(2) are unconstitutional and that she was denied effective assistance of counsel. In her Motion to Withdraw Plea, defendant claims that due to ineffective assistance of counsel and due to the

Court's insufficient plea colloquy, her pleas of no contest were not voluntarily and knowingly made. Defendant therefore asks the court to withdraw her pleas of no contest and to vacate the imposed sentences.[1] In her Motion to Modify Sentence, defendant alleges the Court relied on questionable blood draw results and on an inaccurate medical history when sentencing defendant. Defendant therefore asks the Court to vacate the imposed sentences and to grant another sentencing hearing.

For the following reasons, defendant's claims of unconstitutionality are **dismissed**, the Motion to Withdraw Plea is **denied**, and Motion to Modify Sentence is **denied**.

ANALYSIS

A. Claims of Unconstitutionality

In her Notice of Claim of Unconstitutionality defendant asserts that: 1) Wisconsin Statues [sic] section 940.09(1)(a) " . . . proscribing the crime of homicide by an intoxicated operation of a motor vehicle is unconstitutional in that it does not require a causal connection between the intoxicated condition of the operator and the death of another person"; 2) " . . . the affirmative defense provision set out in [Wisconsin Statutes section] 940.09(2) invades the right to be presumed

[1] Defendant does not state which of the six imposed sentences she wishes to withdraw, therefore, the Court will presume she seeks to withdraw all of them.

innocent and the right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution . . . " and 3) " . . . the failure to advise the defendant on the affirmative defense set out in [Wisconsin Statutes section] 940.09(2) denied the defendant due process and effective assistance of counsel."[2] (Notice of Claim of Unconstitutionality, 2).

In 1985, the Wisconsin Supreme Court in *State v. Caibaiosai,* considered the first two issues presented by defendant, and ruled that Wisconsin Statutes sections 940.09(1)(a) and 940.09(2) are constitutional.[3] *State v. Caibaiosai,* 122 Wis.2d 587, 589, 363 N.W.2d 574, 575 (1985). In 2005, the Wisconsin Supreme Court again ruled that Wisconsin Statutes section 940.09 was constitutional. *State v. Fonte,* 2005 WI 77, 281 Wis.2d 654, 698 N.W.2d 594. Therefore, because it is well-settled by Wisconsin case law that

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[2] Defendant also raises the issue of ineffective assistance of counsel in her Motion to Withdraw Plea; the Court discusses this issue in section B below.

[3] It appears Attorney Irpino copied the issues from *Caibaiosai* word for word. In fact, in the Notice of Claim of Unconstitutionality Attorney Irpino lifted at least twenty paragraphs, word for word, from other cases, most extensively from *State v. Caibaiosai,* 122 Wis.2d 587, 363 N.W.2d 574 (1985) and *State v. Fonte,* 2005 WI 77, 281 Wis.2d 654, 698 N.W.2d 594, without the use of quotations, pinpoint citations, and in many instances, no citation to the case whatsoever. Similarly, in the Motion to Withdraw Plea, Attorney Sassan copied, word for word, three paragraphs from *State v. Garrison,* 2007 WL 2033315, an unpublished case, and included no citation to the source.

Wisconsin Statutes sections 940.09(1)(a) and 940.09(2) are constitutional, defendant's claims of unconstitutionality are groundless, and are therefore **dismissed**.

B. Motion to Withdraw Plea

After sentencing, a court may allow a defendant to withdraw a no contest plea if he or she shows, " . . . by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." *State v. James,* 176 Wis.2d 230, 236-237, 500 N.W.2d 345, 348 (Wis. Ct. App. 1993) (citation omitted). A manifest injustice may arise when a defendant is denied effective assistance of counsel. *State v. Washington,* 176 Wis.2d 205, 213-14, 500 N.W.2d 331, 335 (Wis. Ct. App. 1993). A manifest injustice may also occur when a plea is not knowingly, voluntarily and intelligently entered. *State v. Brown,* 2006 WI 100, ¶4, 276 Wis.2d 559, 687 N.W.2d 543 (citation omitted).

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that counsel's performance was deficient. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). To demonstrate that counsel's performance was deficient, a defendant must identify the deficient acts or omissions and show that counsel's performance fell below objective standards of reasonableness. *State v. McMahon,* 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Wis. Ct. App. 1994) citing *Strickland,* 466 U.S. at 687-688. A court must then

determine " . . . whether, under the circumstances, the act or omission was outside the range of professionally competent assistance." *Id.* A court must presume that counsel provided adequate assistance and " . . . made all significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 690.

Second, a defendant must demonstrate he or she was prejudiced by counsel's deficient performance. *Id.*, at 687. To show prejudice a defendant must demonstrate that "there is a reasonable probability that, but for [the errors], the result of the proceeding would have been different." *State v. Johnson,* 153 Wis.2d 121, 129, 229 N.W.2d 845, 848 (1990) quoting *Strickland,* 466 U.S. at 694. A showing of prejudice cannot be based on mere speculation. *State v. Wirts,* 176 Wis.2d 174, 187, 500 N.W.2d 317, 321 (Wis. Ct. App. 1993).

If, in a post conviction motion, a defendant alleges facts which, if true, would entitle him or her to relief, the court must hold an evidentiary hearing. *State v. Allen,* 2004 WI 106, ¶ 9, 274 Wis.2d 568, 682 N.W.2d 433 citing *State v. Bentley,* 201 Wis.2d 303, 309-10, 548 N.W.2d 50 (1996). "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id.*

Defendant, in her Motion to Withdraw Plea, alleges her pleas of no contest were not knowingly and voluntarily entered due to ineffective assistance of counsel. Defendant claims her attorney failed to 1) properly review her medical records; 2) consult a medical expert regarding whether her medical condition of cranial polyneuropathy from which she suffers vertigo, dizziness, side veering and loss of balance, had an effect on her driving on June 25, 2006; and 3) inform defendant that her medical condition may provide a legal defense to the charges against her. Defendant contends that but for these omissions defendant would not have pled no contest to the charges against her, that she would have had a viable defense at trial, and that the outcome of her case would have been different. This Court disagrees.

Wisconsin Statutes section 940.09(1)(a) provides that anyone who "[c]auses the death of another by the operation or handling of a vehicle while under the influence of an intoxicant" is guilty of a Class D felony. Wis. Stat. § 940.09(1)(a). A defendant charged under Wisconsin Statutes section 940.09(1)(a) may have a defense

> "if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . . "

Wis. Stat. § 940.09(2)(a).

Defendant suggests she was exercising due care and that the head-on collision would have occurred even if she had not been intoxicated when she states that her "medical condition provides an explanation as to the unanswered question as to how Ms. Ludwig's vehicle crossed the median while traveling southbound into the northbound lane of Route 41." (Motion to Withdraw Plea, 10). However, nothing in the record shows that defendant crossed the median. What the record does show is that defendant was driving on Hwy 41 against traffic near Main Avenue when Mr. LaGrow honked his horn as her vehicle advanced toward him. Despite this warning signal, defendant continued to drive until she caused a head-on collision about 500 feet from Scheuring Road and the deaths of Por Vang and Chou Thao. It strains credulity to suggest that defendant could have suffered an incapacitating bout of dizziness, side veering and loss of balance and yet was able to drive from Main Avenue to the near vicinity of Scheuring Road without veering into the ditch.

Upon consideration of these facts, a reasonable attorney could conclude defendant had not exercised due care, was intoxicated, and therefore, had no defense under Wisconsin Statutes section 940.09(2)(a). Thus, because it appears defendant's attorney exercised reasonable professional judgment, his performance cannot be deemed deficient.

Defendant claims the outcome of her case would have been different absent her attorney's errors. However, defendant fails to explain how the outcome

would have been different given her extremely reckless conduct of driving on Hwy 41 against traffic from Main Avenue to the near vicinity of Scheuring Road. Defendant, therefore, failed to show that her attorney's performance was prejudicial. Consequently, because defendant failed to show that her attorney's performance was deficient and prejudicial, she has failed to establish a claim for ineffective assistance of counsel in her Motion to Withdraw Plea.

Defendant also contends she was denied effective assistance of counsel in her Notice of Claim of Unconstitutionality. She claims her attorney failed to preserve evidence of the crash, failed to perform a complete accident reconstruction, and "failed to discover discrepancies in the blood alcohol testing process and then failed to object to its use during the proceedings." (Notice of Claim of Unconstitutionality, 37). However, defendant not only failed to explain how these alleged deficiencies fell below the objective standards of reasonableness, she failed to allege, much less show "a reasonable probability that, but for [the errors] the result would have been different." *See Johnson,* 153 Wis.2d at 129. Defendant, therefore, also failed to establish a claim for effective [sic] assistance of counsel in her Notice of Claim of Unconstitutionality.

Finally, defendant claims in her Motion to Withdraw Plea that her pleas of no contest were not voluntarily, knowingly and intelligently made, due to the Court's insufficient plea colloquy.

A court must hold an evidentiary hearing on a motion to withdraw a plea if a defendant, first of all, makes "a pointed showing that the plea was accepted without the trial court's conformity with §971.08 or other mandatory procedures." *State v. Hampton* 2004 WI 107 ¶46, 274 Wis.2d 379, 683 N.W.2d 14 citing *State v. Bangert,* 131 Wis.2d 246, 274, 389 N.W.2d 12, 26 (1986). " . . . [T]he defendant must point to a specific defect in the plea hearing which constitutes an error by the court. The defendant will not satisfy this burden merely by alleging that 'the plea colloquy was defective' . . . " *Id.* at ¶58. Second, a defendant must also allege " . . . that he [or she] did not know or understand the information which should have been provided at the plea hearing . . . " *Id.* at ¶46 citing *Bangert,* 131 Wis.2d at 274.

In this case, defendant claims the court's plea colloquy was insufficient. However, she did not point to any specific defects in the plea hearing which constituted an error by the court. Therefore, defendant is not entitled to relief on this claim. *See id.* at ¶58.

Furthermore, because defendant failed to allege facts which, if true, would entitle her to relief, her Motion to Withdraw Plea is summarily **denied** without a hearing. *See Allen,* 2004 WI 106, ¶9.

C. Motion to Modify Sentence

In Wisconsin, sentence modification is a two-step process. *State v. Franklin,* 148 Wis.2d 1, 8, 434

N.W.2d 609, 611 (1989). First, the defendant must establish by clear and convincing evidence that a new factor exists, which justifies modification of the original sentence. *Id.* at 8-9 (citation omitted). A new factor is "a fact or set of facts highly relevant to the imposition of the sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State,* 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). A matter is "not a relevant factor unless the court expressly relies" on it at sentencing. *Franklin,* 148 Wis.2d at 15.

Second, if a new factor exists, then the circuit court must "determine whether the new factor justifies modification of the sentence." *Id.* (citation omitted). The new factor must be an event or development that frustrates the purpose of the original sentence. *State v. Michels,* 150 Wis.2d 94, 99-100, 441 N.W.2d 278, 279 (Wis. Ct. App. 1989).

Defendant alleges in her Motion to Modify Sentence that the Court, at sentencing, relied on the pre-sentence report's inaccurate blood draw results. Defendant states that her "initial blood draw result was reported as .203" and claims that her blood sample was tested again, but fails to state in her motion what the result was. (Motion to Modify Sentence, ¶8). The Court has reviewed the pre-sentence investigation and it contains no reference to defendant's blood alcohol concentration (BAC). At the sentencing hearing, the prosecution brought to the

court's attention that the pre-sentence investigation contained no discussion of defendant's BAC, but stated that defendant's BAC on June 25, 2006 was .209. (Transcript of Sentencing Hearing, 14:14-15).

Defendant appears to argue that since defendant's BAC results of .203 and .209 were dissimilar, a new factor exists and justifies a motion to modify sentence. However, this slight dissimilarity in BAC results does not constitute a new factor; the Court did not expressly rely on either the .203 or the .209 BAC result when sentencing defendant. Rather, the Court stated that defendant was highly intoxicated having a BAC two and a half times the legal limit.

The evidence presented in the Preliminary Hearing, which defendant agreed would provide the factual basis upon which the Court would accept her pleas and sentence her, leaves no doubt that defendant was highly intoxicated in the early morning hours of June 25, 2006. Defendant's eyes were red and glossy, her breath smelled of alcohol, her speech was slurred, she lacked hand dexterity, she was disoriented as to where she was going, and failed to react to Mr. LaGrow's warning signal. Furthermore, a Preliminary Breath Test indicated a .20 blood alcohol concentration, which is a BAC two and a half times the legal limit of .08.

Defendant also states the pre-sentence report failed to accurately report her medical conditions of benign positional vertigo and mitral valve prolapse, and that the court failed to consider the defendant's

medical history as mitigating factors when sentencing defendant. However, defendant's medical condition is also not a new factor which justifies a sentence modification.

The pre-sentence investigation and the Cedar Creek sentencing report discussed defendant's diagnoses of mitral valve prolapse and benign vertigo, and Judge Naze indicated at sentencing he had reviewed the record. Not only was defendant's medical condition known to the Court at the time of sentencing, it also was not relevant to the imposition of defendant's sentence. What the Court did consider highly relevant was the fact that defendant was highly intoxicated having a BAC two and a half times the legal limit, and the fact that defendant engaged in extremely reckless conduct by driving on the wrong side of a divided highway before dawn.

Therefore, because defendant failed to present a new factor, and because defendant failed to allege facts which, if true, would entitle her to relief, the Motion to Modify Sentence is **denied** without a hearing. *See Allen*, 2004 WI 106, ¶9.

CONCLUSION

For the forgoing reasons, defendant's claims of unconstitutionality are **dismissed**, the Motion to Withdraw Plea is **denied**, and the Motion to Modify Sentence is **denied**.

Dated this 12th day of June, 2009.

BY THE COURT:

/s/ [Illegible]
Marc A. Hammer
Circuit Court Judge,
Branch V

[copies mailed 6/12/09 NB]

cc: Attorney Anthony J. Sassan
Attorney Mark A. Irpino
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January 11, 2011

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You are hereby notified that the Court has entered the following order:

No. 2009AP1725-CR *State v. Ludwig*, L.C.#2006CF663

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Dawn M. Ludwig, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

A. John Voelker
Acting Clerk of
Supreme Court